Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JOHN E. NAGLE, ET AL., Petitioner,

v.

HENRY C. BAILEY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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and

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Whether recent amendments under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") place the power to confer jurisdiction for habeas corpus appeals through the issuance of certificates of appealability solely in circuit justices and judges pursant to 28 U.S.C 2253(c), at the same time allowing district courts to make recommendations relative to the disposition of habeas corpus appeals through the issuance of their own certificates of appealability pursuant to F.R.A.P. Rule 22(b)?

THE PARTIES

The parties are Henry C. Bailey, an Alabama state inmate who sought and was denied a writ of habeas corpus from the U.S. District Court for the Middle District of Alabama (herein "Respondent"), John E. Nagle, et al., Warden, Donaldson Correctional Facility, Bessemer, Alabama, and Jeff Sessions, Attorney General for the State of Alabama (herein "Petitioners").

This case was consolidated below with Hunter v. United States, 96-6513, for the purpose of en banc hearing in the Eleventh Circuit.

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OPINION AND ORDER BELOW

The Opinion of the Court of Appeals in Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996), affirming the action of the District Court in granting a certificate of appealability to Respondent Henry C. Bailey, appears in the Appendix hereto. The Order of the United States District Court for the Middle District of Alabama, Northern Division, granting a certificate of appealability to Respondent Bailey under the authority of 28 U.S.C 2253(c) and Rule 22(b), F.R.A.P., as amended by the "Anti-terrorism and Effective Death Penalty Act of 1996" ("AEDPA"), also appears in the Appendix.

JURISDICTION

The en banc judgment and Opinion of the Court of Appeals for the Eleventh Circuit was entered on December 10, 1996. No rehearing was taken. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Public Law 104-132, 104th Congress (April 24, 1996), 110 Stat. 1214, otherwise known as the "Anti-terrorism and Effective Death Penalty Act of 1996" ("AEDPA"), also appears in the Appendix.

STATEMENT OF THE CASE

In 1991 Bailey was convicted in an Alabama state court on a charge of distribution of a controlled substance. (R1-9-92) After exhausting his state court remedies, Bailey filed a petition for writ

of habeas corpus in the United States District Court for the Middle District of Alabama on March 1, 1995. (R1-1-1) On November 13, 1995, Magistrate Judge Charles S. Coody issued a Recommendation that Bailey's petition be denied. (R1-30-1) On April 24, 1996, the AEDPA was signed into law by President Clinton.

On June 21, 1996, Magistrate Judge Coody issued a second Recommendation that Bailey's habeas petition be denied. (R1-49-1) Ultimately, the Magistrate's Recommendation was adopted by Order of U. S. District Judge Myron Thompson on July 11, 1996, and Bailey's habeas corpus petition was dismissed. (R1-50-1; R1-52-1)

On July 29, 1996, Bailey filed a motion to proceed in forma pauperis in an appeal from the District Court's denial of his habeas petition. (R1-29-1) At the same time, Respondent Bailey filed in the District Court a Motion for Certificate of Probable Cause pursuant to former 28 U.S.C. §2253. (R1-56-1)

On August 21, 1996, the District Court granted Bailey a certificate of appealability under Rule 22(b), F.R.A.P., as amended by the AEDPA. (R1-58-1) In granting Respondent Bailey's certificate of appealability, the District Court noted that, in order to foreclose any concerns that the district court was not empowered to grant the certificate under amended §2253, it had also required Bailey to obtain a certificate of appealability from the United States Court of Appeals for the Eleventh Circuit. (R1-58-1)

On September 23, 1996, the Eleventh Circuit issued an order directing the parties to brief and argue the issue of

whether a district court in an action filed pursuant to 28 U.S.C. §2254, as amended by the AEDPA, had the authority to grant a certificate of appealability. The Eleventh Circuit heard argument in the case en banc on November 20, 1996.

On December 10, 1996, the Eleventh Circuit issued the Opinion below, holding that district courts were authorized to grant certificates of appealability under Rule 22(b), F.R.A.P., and that the issuance of a certificate of appealability to Respondent Bailey by the district court was sufficient to confer jurisdiction under §2253 for the appeal of Respondent's §2254 case.

REASONS FOR GRANTING THE WRIT

1. THE MANNER IN WHICH THE 11TH CIRCUIT RESOLVED THE AMBIGUITY IT PERCEIVED BETWEEN THE "CERTIFICATE OF APPEALABILITY" AMENDMENTS TO F.R.A.P. RULE 22(b) AND 28 U.S.C. §2253(c) RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

This case presents an important issue which for two distinct reasons the Supreme Court should grant certiorari in order to resolve. First, this Court should grant the writ in order to settle the widespread confusion throughout the country in both the district and circuit courts over an aspect of 1996 federal habeas corpus law reform no less important than the manner in which habeas appeals are taken.[1] Second, arguably there is a very real conflict in the way the "certificate of appealability" amendments to §2253 and Rule 22(b) are being interpreted in the various circuits.

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[1]The 11th Circuit noted in its opinion below that "(b)ecause the issue is an important one involving the proper handling of hundreds of cases per year in this circuit, we took the extraordinary step of granting hearing en banc to resolve the matter." Hunter, 101 F.3d at 1568. Multiplying the stated magnitude of the issue in one circuit across all the circuits illustrates its potential nationwide magnitude.

a. Because the respective scopes of the two provisions are different, there is no ambiguity between §2253(c) and Rule 22(b).

In deciding the instant case, the 11th Circuit sought to interpret an ambiguity that it perceived between the 28 U.S.C. §2253 amendments found in §102 of the AEDPA, and the F.R.A.P. Rule 22 amendments found in §103 of the AEDPA. See Hunter v. U.S., 101 F.3d 1565 (11th Cir. 1996) This ambiguity relates to whether district courts are authorized by the amended provisions of either or both §2253(c) and Rule 22(b) to issue certificates of appealability to habeas corpus petitioners whose petitions have been denied by the district court.

In reaching its conclusion that both §2253(c) and Rule 22(b) authorize district courts to confer jurisdiction for habeas corpus appeals through the issuance of certificates of appealability, the 11th Circuit looked both to general principles of statutory construction and to the legislative history of the AEDPA in order to resolve the apparent ambiguity between the two provisions. In doing so, however, the 11th Circuit overlooked two things. First, the 11th Circuit failed to seriously consider the possibility that the two provisions could be interpreted without finding them ambiguous. Such a "plain language" interpretation of the statute would have obviated the need for the 11th Circuit to apply the general principles of statutory construction that it did. Second, a "plain language" interpretation of the statute would have also obviated the need to look to the legislative history of the AEDPA in order to determine Congress' intent in enacting the two provisions at issue.

Standing alone, nothing about either §2253(c) or Rule 22(b) is particularly ambiguous. It is only when one attempts to reconcile their provisions with one another that the ambiguity arises. Each provision authorizes the judicial officers referenced therein to issue certificates of appealability; Rule 22 authorizes district judges to do so, while §2253 so authorizes circuit justices or judges.

What the Eleventh Circuit essentially failed to recognize in its Opinion below is that, as between §2253(c) and Rule 22(b), it is only §2253(c) that acts to confer appellate jurisdiction. Before passage of the AEDPA, Rule 22(b) gave both district and circuit judges the authority to grant certificates of probable cause, with "the district judge who rendered the judgment" specifically having the first opportunity to issue the certificate. See former F.R.A.P. Rule 22(b). At the same time §2253 provided that "the judge who rendered the order", i.e., the district judge, had a co-extensive authority through the issuance of a certificate of probable cause to also confer jurisdiction for the appeal.

With the AEDPA amendments to §2253(c) and Rule 22(b), Rule 22(b) still gives "the district judge who rendered the judgment" the power in the first instance to issue a certificate of appealablity. What is different now, however, is that district courts are no longer mentioned in a jurisdiction-confering sense in §2253(c). Because district courts are now only refered to in Rule 22(b), they no longer posseess the co-extensive authority to confer jurisdiction for an appeal that they once had.

Thus, a certificate of appealability issued by a district court pursuant to the rule now can only be considered to be a "recommendation" to the circuit court concerning the circuit court's own ultimate exercise of its §2253(c)-based, jurisdiction-confering, certificate issuance authority. In other words, where Rule 22(b) says that --

> . . . an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) . . .

what is meant is that, irregardless of whether a district court issues a certificate of appealability in the first instance pursuant to its authority under Rule 22(b), a certificate of appealability must also be issued "pursuant to section 2253(c)" in order for jurisdiction to be confered for a habeas appeal to go forward. See 28 U.S.C. §2253(c).

Although clearly a limitation on the jurisdiction-confering power of the district court, the fact that the only kinds of judges authorized by §2253 to issue certificates of appealability "pursuant to section 2253(c)" are "circuit justice(s) or judge(s)" in no way affects or diminishes the authority otherwise possessed by the district courts under Rule 22(b) to issue the kind of certificates of appealability that they do have the authority to issue, i.e., ones making a recommendation to a circuit court relative to that court's ultimate disposition of the issue. Nor, as specifically concerned the 11th Circuit below, can such a construction of the AEDPA amendments be said to render Rule 22(b) superfluous in a statutory construction

sense, since under an interpretation such as Petitioner's, Rule 22(b) still has the force and effect of authorizing the issuance of certificate of appealability "recommendations" in habeas appeals in the first instance by district judges. Such a construction also acknowledges and builds on the fact noted by various courts which have addressed the issue, including the 6th Circuit, i.e., that the district court, already being familiar with the case after having denied the petition, is the judicial officer in the best position to initially note those issues which it deems meet the 2253(c)(2) standard. See Lyons, supra. at 4. But none of this changes the fact that it is the issuance of a certificate by a circuit justice or judge" that allows a habeas appeal to, in the words of the first sentence of Rule 22(b), actually "proceed".

The Rules Enabling Act, 28 USC §2072 authorizes this Court to --

> "prescribe general rules of practice and procedure in the United States . . . courts of appeal."

See Willy v. Coastal Corp, 503 U.S. 131, 134, 117 L.Ed. 2d 280, 287, 112 S.Ct. 1076 (1992) However, Willy also recognizes that --

> federal courts, in adopting rules, (are) not free to extend or restrict the jurisdiction conferred by a statute.

Id.; see also Sibbach v. Wilson & Co., 312 U.S. 1, 85 L.Ed 479, 61 S.Ct. 422 (1941).

This is collaterally important to the issue presented here for two reasons. First, it acts to illustrate a premise central to this petition -- that it is not

F.R.A.P., Rule 22 which confers jurisdiction for federal habeas corpus appeals; rather, it is the statute -- 28 USC §2253 -- which does so. Rule 22 in and of itself cannot "abridge, enlarge or modify any substantive right". Willy, Id..

As between the two provisions, it is only §2253(c) which acts to confer appellate jurisdiction. Petitioner asserts that amended Rule 22(b) merely creates a procedure whereby a district court is given an initial opportunity to note those issues for which it determines the petitioner has made the requisite "substantial showing of the denial of a constitutional right". Where a district court initially issues a certificate of appealability, unless a certificate is also issued by a circuit justice or judge, jurisdiction for the appeal is not invoked "pursuant to §2253(c).

b. Because there is no ambiguity between §2253(c) and Rule 22(b), the plain language of the AEDPA should control their interpretation.

Prior to the AEDPA amendments, it was established law that a circuit judge or justice entertaining an application for a certificate of probable cause was bound to give "weighty consideration to its prior denial by a district judge. See Nowakowski v. Maroney, 386 U.S. 542, 543, 18 L.Ed.2d 282, 284, 87 S.Ct. 1197 (1967) Nowakowski held, however, that --

> "(w)hen a district judge grants such a certificate, the court of appeals must grant an appeal . . . and proceed to a disposition of the appeal in accord with its ordinary procedure.

Id. (emphasis added) At the time that Nowakowski was decided, and thereafter up until the enactment of the AEDPA, 28 U.S.C. §2253 provided in pertinent part:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

(emphasis added) With the adoption of the AEDPA, however, the language referring to the issuance of a certificate by "the justice or judge who rendered the order" was excised from the statute, leaving only the language referring to the issuance of certificates by "a circuit justice or judge".

It is axiomatic that where Congress knows how to say something but chooses not to, its silence is controlling. BFP v. Resolution Trust Corp., 511 U.S. ___, 114 S.Ct. 1757, 1761, 128 L.Ed.2d 556 (1994) Had Congress wanted the amended §2253(c) phrase "circuit justice or judge" to be read "circuit justice or (district) judge", or "circuit justice or judge (who rendered the order)", it could have easily provided for such a reading. This is clearly evidenced by the fact that Congress had already shown in §2253 prior to the AEDPA amendments that it knew how to say "justice or judge who rendered the order", and in the AEDPA amendment to Rule 22(b) that it knew how to say "district judge".

It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section

of a statute but omits it in another. BFP v. Resolution Trust Corp., supra., quoting Chicago v. Environmental Defense Fund, 511 U.S. ___, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994) Furthermore, under accepted canons of statutory construction, legal terms used in framing a statute are ordinarily presumed to have been intended to convey their customary legal meaning. See Bradley v. United States, 410 U.S. 605, 609, 93 S.Ct. 1151, 1154-55, 35 L.Ed.2d 528 (1973); see also Singer, 2A Sutherland Stat. Constr. §47.30 at p. 262 (5th ed. 1992)

Petitioner's position is that the phrase "circuit justice or judge", as used in §2253 both before and after the AEDPA, is such a legal term of art, entitled to its customary legal meaning. The particular legal meaning at issue here relates to the fact that, under both the former and, presumably, the present law, certificates under §2253 could and can be issued both by the individual judges of the courts of appeals, or by a Supreme Court Justice in his or her capacity as a Circuit Justice. See Parker v. Norris, 929 F.Supp. 1190, 1191 (E.D.Ark. 1996), citing Rosoto v. Warden, 375 U.S. ___, 83 S.Ct. 1788, 11 L.Ed.2d 15 (1963); In re Burwell, 350 U.S. 521, 522, 76 S.Ct. 539, 540, 100 L.Ed.2d 666 (1956) Accordingly, the word "judge" in the phrase "circuit justice or judge" has absolutely nothing to do with district judges, and it would be a highly strained reading indeed that would seek to force such a meaning. C.f. Witt v. Edwards, 1996 WL 719249 (N.D. Ohio); Burke v. United States, 1996 WL 711270 (E.D. Pa.)

c. Even if there is ambiguity between the provisions of §2253(c) and Rule 22(b) on the issue of whether district courts are authorized to confer jursidiction for the appeal of an habeas corpus case, the legislative history cited by the Eleventh Circuit to resolve this ambiguity is inapplicable.

In its en banc Opinion below, the 11th Circuit held --

> "The legislative history leading up to the enactment of the AEDPA §§102-103 amendments to 28 U.S.C. 2253 and to the Federal Rules of Appellate Procedure 22(b) does not convince us that Congress intended to divest district judges of the authority to issue certificates of appealability. To the contrary, the legislative history of the amendment indicates otherwise. It certainly does not override the force of the decisional law requiring that we give all the language of both §2253(c) and Rule 22(b), as amended, effect.

See Hunter v. U.S., 101 F.3d 1565, 1583 (11th Cir. 1996)

Upon close inspection of the legislative history referenced in Hunter, it becomes clear that this history relates neither to S. 735 nor to H. 2703, the two bills ultimately enacted by Congress as the AEDPA. Rather, the legislative history upon which the 11th Circuit based its opinion that Congress intended in its 1996 reform to drop what had commonly been referred to as the "Judge Friendly proposal" for placing the authority to grant habeas appeals solely

in the circuit courts -- a provision that for decades had been a part of every significant habeas corpus reform effort -- apparently relates to two other versions of the bill that were not, in fact, adopted, i.e., S. 623 and H.R. 729. As pointed out recently by Sixth Circuit in Lyons v. Ohio Adult Parole Authority, 1997 WL 20401 {6th Cir.(Ohio)} this kind of legislative history, i.e., that consisting of statements made by persons in favor of rejected or failed bills, is meaningless and cannot be used as an extrinsic aid to the interpretation of the provisions of a different bill ultimately enacted. Id. at p. 6, citing Singer, 2A Sutherland Stat. Constr. §48.01 at p. 302 (5th ed. 1992).

Thus, the very legislative history cited by the 11th Circuit as determinative of the intent of Congress in actuality provides no assistance in the resolution of the ambiguity between §2253(c) and Rule 22(b) on the issue of the how to treat a certificate of appealability issued by a district court under the AEDPA.

2. BECAUSE OF THE PERCEIVED AMBIGUITY BETWEEN THE "CERTIFICATE OF APPEALABILITY" AMENDMENTS TO F.R.A.P. RULE 22(b) AND 28 U.S.C. §2253(c), A PROCEDURAL CONFLICT EXISTS AMONG THE CIRCUITS THAT SHOULD BE SETTLED BY THIS COURT.

The 11th Circuit in the present case, and the 6th Circuit in Lyons v. Ohio Adult Parole Authority, 1997 WL 20401 {6th Cir.(Ohio)}, have similarly decided the certificate of appealability issue in lengthy opinions. Each of these circuits resolved the apparent ambiguity between the language of 2253(c) and Rule 22(b) on the

issue of whether district courts are authorized under the AEDPA to issue certificates of appealability in habeas corpus cases by determining that the only way under general principles of statutory construction to give force and effect to the language of Rule 22(b) is to give the commonly known and previously used §2253 legal phrase "circuit justice or judge" an entirely new meaning, one that includes within its scope district court judges.

On the other hand, the 5th Circuit in Else v. Johnson, 104 F.3d 82 (5th Cir. 1997) has come to the same conclusion, but under a different analysis. The 5th Circuit, in recently holding in Else that it was Rule 22(b) that authorized district judges to issue certificates, specifically criticized the 11th Circuit's Hunter rationale that found support for the issuance of certificates of appealability by district judges in the text of §2253(c). See Else, supra., at fn. 1.

In effect, what it appears the 5th Circuit has done is to adopt a wait-and-see approach similar to those instituted by temporary rule in the 1st and 7th Circuits. See Lyons, supra. at 3. Unlike the 5th and 11th Circuits, the 1st and 7th Circuits have adopted circuit rules to manage the perceived ambiguity between §2253(c) and Rule 22(b). The 7th Circuit's interim rule allows its district courts to issue certificates of appealability and requires a petitioner to make an initial application to the district court before asking a circuit judge for a certificate. See 7th CIR.R. 22.1(b) (Interim Rule) ("Every request for a certificate of appealability must be made initially to a judge of the district court.") If the district judge issues the

certificate, the petitioner's appeal goes forward. Lyons, supra. at 3.

The 1st Circuit's rule does the same, except that its rule requires that, even where a certificate has been issued by the district judge, a certificate from a circuit judge or justice must also be issued in order to allow the appeal to go forward "pursuant to §2253(c)". See 1st CIR.R. 22.1(b) (Interim Rule) ("In this circuit, ordinarily neither the court nor a judge thereof will initially receive or act on a request for a certificate of appealability if the district judge who refused the writ is available unless an application has first been made to the district court judge.") It is only this second certificate of appealability, issued by the circuit court, which allows the appeal to be processed. Lyons, supra. at 3.

Thus, of the five circuits that have addressed the issue, two have read §2253(c) to allow district courts to issue jurisdiction-confering certificates of appealability, one has found the authority for district courts to issue jurisdiction-confering certificates solely in Rule 22(b), one has enacted a temporary circuit rule that allows both district and circuit judges to issue the jurisdiction-confering certificates, and one -- the 1st circuit -- has adopted a circuit rule that sets forth a procedure of the sort that Petitioner Nagle would argue is, in fact, the one most representative of the post-AEDPA balance between §2253(c) and Rule 22(b) apparently intended by Congress.

The 1st Circuit's process requires that applications for certificates of appealability be considered first in the district court, so as to allow the lower

court the first opportunity to note any issues it feels meet the §2253(c)(2) standard. If the district court grants its certificate of appealability, the circuit court must also then grant its own certificate of appealability in order for the appeal to go forward. If the district court fails to issue a certificate, the circuit court can still solely confer jurisdiction for the appeal by issuing its certificate of appealability.

This Court is being called on here to settle the widespread confusion throughout the country that the amendments to these statutory law provisions have engendered. In so doing, however, it may be necessary for this Court to re-visit certain decisional law, specifically, its prior holding in Nowakowski v. Maroney, 386 U.S. 542, 18 L.Ed.2d 282, 87 S.Ct. 1197 (1967)

In Nowakowski this Court instructed circuit courts on how, under the former law, they were to treat district court certificates of probable cause. At the time that Nawakowski was decided, 28 U.S.C §2253 contained language that, for the reasons stated infra., supported this Court's conclusion that the issuance of a certificate of probable cause by a district court compelled the circuit court to process and dispose of the appeal.

The 5th, 6th, 7th and 11th Circuits, not to mention the numerous district courts, are now interpreting amended §2253(c) and amended Rule 22(b) so as to read the Nawakowski standard directly into the new provision. However, because of the AEDPA amendments to §2253, Petitioner Nagle asserts that the explicit language of amended §2253(c) now justifies a different conclusion. Only a clear statement by this

Court addressing the effect of the AEDPA amendments on the Nowakowski standard can properly and effectively settle this matter.

CONCLUSION

There is no ambiguity between §2253(c) and Rule 22(b), if you consider the fact that §2253 is the statutory/jurisdictional basis for habeas appeals, and that Congress specifically amended §2253 via the AEDPA to take out any reference in that jurisdictional statute to district courts. Under this view, the remaining power that district courts have under Rule 22(b) to issue certificates is a power more in the nature of a "recommendation" than it is a co-equal method of conferring jurisdiction for habeas appeals. Thus, a certificate issued under Rule 22(b) is, in fact, a "recommendation" -- a concept already common to habeas jurisprudence, i.e., the magistrate recommends initial disposition to the district judge, the district judge recommends appealable issues to the circuit judge, the circuit judge decides which issues, if any, merit an appeal, and disposes of the appeal.

In order for jurisdiction for a habeas appeal to be conferred, however, irregardless of what the district court does, the circuit court must issue a certificate of appealability under §2253(c). The authority to issue a certificate under Rule 22(b) and the authority to confer jurisdiction for a habeas appeal being two seperate things, there is no ambiguity in the statute.

Even if there is ambiguity in the statute, the legislative history cited by the 11th Circuit to resolve the ambiguity

below contrary to Petitioner Nagle's position is inapplicable, because it relates to versions of the bill that were not the ones finally enacted. Thus, at a minimum this Court should at least take a fresh look at the resolution of any ambiguity that it deems to exist in the amended provisions of §2253 and Rule 22.

Respectfully submitted,

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